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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

CARL DAUGHERTY,

Petitioner,

v.

CITY OF EL PASO,

Respondent.

On Petition for A Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN DIABETES ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

The American Diabetes Association ("Association") is a nationwide, non-profit, voluntary health organization founded in 1940 and made up of persons with diabetes, health professionals who treat persons with diabetes, research scientists and other concerned

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[1] This brief is filed with the consent of the parties. Copies of the consents are on file with the Clerk.

individuals. The mission of the Association is to prevent and cure diabetes and to improve the lives of all people affected by diabetes.

Presently, there are over 16 million Americans with diabetes, including some 3.8 million persons who take some insulin to help treat their diabetes.[2] The Association has 52 state affiliates and more than 800 chapters throughout the United States. With over 300,000 members, the Association is the nation's oldest, largest and leading voluntary health organization addressing diabetes-related concerns.

Among the Association's principal concerns is the fair and equitable treatment in employment of persons with diabetes. Since 1984, the Association has advocated for the following policy concerning the employment of persons with diabetes:

> "Diabetes as such should not be a cause for discriminating against any person in employment. *People with diabetes should be individually considered for employment*, weighing such factors as requirements or hazards of the specific job, and the individual's medical condition and treatment

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[2] *Diabetes Statistics*, National Diabetes Information Clearinghouse, National Institutes of Health (NIH Publication No. 96-3926 (1995).

> regimen (diet, oral hypoglycemic agents and insulin). Any person with diabetes, whether insulin dependent or non-insulin dependent, should be eligible for any employment for which he or she in otherwise qualified. (Emphasis added). *Employment Policy Statement,* American Diabetes Association (1984).

Consistent with this policy, the Association has appeared as *amicus curiae* in cases throughout the United States, including the Supreme Court of the United States, involving restrictions on the employment of persons with diabetes.

Amicus knows through experience that employers restrict employment opportunities to persons who take some insulin to treat their diabetes based on prejudices, stereotypes or unfounded fears concerning diabetes and insulin in the workplace. *Amicus* is a resource for information to help employers understand that persons who take some insulin to treat their diabetes can be safe and productive workers. Indeed these people are usually superior employees because of their awareness and concern about safety in the workplace. *Amicus* advocates for treating persons with diabetes as individuals and not as a category whenever they are considered for an employment opportunity. This is especially important for people

who take some insulin to treat their diabetes because of the ignorance and misunderstanding about diabetes and insulin in the workplace.

SUMMARY OF ARGUMENT

This Court should grant Certiorari to resolve a clear and growing split in the lower courts and between federal courts and state courts of last resort on a legal issue affecting the civil rights of 3.8 million Americans who take some insulin to treat their diabetes. The resolution of such conflicts and the guidance of this Court are required to sustain the vitality of the Americans With Disabilities Act for such persons.

A grant of Certiorari is also called for in this case because it presents an issue of national significance. Petitioner poses a question critical to the employment rights for a group who are deprived of employment opportunities solely because they take insulin to treat their diabetes. These persons need to be individually evaluated and not treated only as a category. Such an individualized treatment is consistent with the significant medical and technological advances made in managing diabetes, particularly diabetes in the workplace.

The record in this case clearly frames the legal issue presented. The Fifth Circuit Court based its denial of employment opportunity and protection under the Americans With Disabilities Act solely and exclusively on the fact that Petitioner took some insulin to treat his diabetes. Such a myopic focus caused the Fifth Circuit Court to reverse a trial court judgment in favor of Petitioner and providing Petitioner with damages for discrimination in the workplace.

Finally, this Court should grant the Writ to reverse the erroneous decision of the Fifth Circuit Court which threatens to seriously undermine the civil rights of persons who take insulin to treat their diabetes. The court below failed to follow the mandate of this Court and of Congress in requiring an individualized assessment as to whether a person was otherwise qualified to drive a city bus, even though that person took some insulin to treat his diabetes. The court below made its decision on the basis of stereotypes and unfounded fear, not on whether Petitioner was "otherwise qualified", to adequately and safely perform the job of a city bus driver.

ARGUMENT

I. THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THERE IS A GROWING CONFLICT OF AUTHORITY AND DISAGREEMENT AMONG LOWER COURTS ON THE QUESTION OF WHETHER AN INDIVIDUALIZED INQUIRY IS REQUIRED IN APPLYING THE PROTECTIONS OF THE AMERICANS WITH DISABILITIES ACT.

There is a growing conflict of authority and disagreement among lower courts on how to evaluate whether a person who takes some insulin to treat his diabetes is "otherwise qualified" to perform a particular job. There is an increasing number of courts who have followed the "individualized inquiry" mandate of *School Board of Nassau County, Florida v. Arline,* 480 U.S. 273 (1987). See: *Lane v. Pena,* 867 F.Supp. 1050 (D. DC 1994) (maritime academy cadet); *Sarsycki v. United Parcel Service,* 862 F.Supp. 336 (W.D. OK 1994) (package car driver); *Bombrys v. City of Toledo,* 849 F.Supp. 1210 (N.D. OH 1993) (police trainee candidate); *Barth v. Gelb,* 761 F.Supp. 830 (D. DC 1991) (foreign service specialist with Voice of America); *Serrapica v. City of New York,* 708 F.Supp. 64 (S.D. NY 1989) (sanitation worker). These cases require that an

"individualized inquiry" be made of each person seeking a particular job who is taking some insulin to treat their diabetes under both the Rehabilitation Act and the Americans With Disabilities Act.

To the contrary, other courts refuse to follow the "individualized inquiry" mandate of *Arline* and have categorically denied employment opportunities to persons based solely on the fact that they were taking some insulin to treat their diabetes. See: *Chandler v. City of Dallas,* 2 F.3d 1385 (5th Cir. 1993) *cert. den.,* 114 S.Ct. 1386 (1994) (city employee who drives as part of his job); *Davis v. Meese,* 692 F.Supp. 505 (E.D. PA 1988), *aff'd without opinion,* 865 F.2d 592 (3d Cir. 1989) (FBI Special Agent). The Fifth Circuit in this case felt "bound" by the *Chandler* decision even though *Chandler* has been criticized and rejected in *Sarsycki v. United Parcel Service,* supra, 341. *Davis v. Meese* has been criticized and rejected in *Bombrys v. City of Toledo,* supra, 1219-1220.

Also, the Fifth Circuit's decision in this case directly conflicts with state court decisions concerning an "individualized inquiry" as to whether a worker was "otherwise qualified" for a particular job. See: *Commonwealth Department of Transportation*

v. Tinsley, 564 A.2d 286, 288 (Pa. Cmwlth. 1989) (school bus driver with diabetes); *Jackson v. State*, 544 A.2d 291, 297-298 (Me. 1988), *cert.den.*, 491 U.S. 904 (1989) (school bus driver with insulin-dependent diabetes). Both of these decisions follow the *Arline* standard and make an individual assessment of each employee for a school bus driver job.

It is clear that the lower courts need this Court to reaffirm its mandate for "individualized inquiry" when analyzing whether a person is "otherwise qualified" under the Americans With Disabilities Act. The lower courts need guidance from this Court to avoid continuing disagreement and uncertainty on how to decide whether a disabled person is "otherwise disqualified" and therefore eligible for the protections of the Americans With Disabilities Act. It is essential that this Court take this case in order to clarify and reaffirm the necessity of applying the *Arline* standard to the growing caseload under the Americans With Disabilities Act.

Certiorari should be granted in this case pursuant to this Court's guideline that a purpose of certiorari jurisdiction is to resolve

lower court conflicts and conflicts with decisions by state courts of last resort. Supreme Court Rules 10(a) and 10(b).

II. THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THE LEGAL ISSUE PRESENTED HAS A SUBSTANTIAL IMPACT ON THE EMPLOYABILITY OF THE 3.8 MILLION AMERICANS WHO TAKE SOME INSULIN TO TREAT THEIR DIABETES.

This case is especially important to the Association and raises questions of exceptional national importance. The opinion of the Fifth Circuit in this case affects the interests of 3.8 million Americans who take some insulin to help treat their diabetes. Under the Fifth Circuit's decision, any person who takes any insulin to help treat their diabetes will be categorically and automatically disqualified from any job which requires them to drive a vehicle and will be denied any protection under the Americans With Disabilities Act. In particular, under this decision, even individuals who successfully control, monitor and treat their diabetes will be excluded from protection if they take any insulin. The opinion below sanctions a blanket and categorical "as a matter of law" exclusion from protection and denies significant employment opportunity solely on

the basis of taking insulin to treat diabetes. There is no showing that Petitioner was not able to safely drive a city bus or that Petitioner created any significant, unusual or unmanageable danger or risk of safety to the public.

Since 1984, in recognition of the tremendous progress made in the treatment and daily management of diabetes, the Association has advocated that any person with diabetes should be eligible for any employment for which he/she is otherwise qualified. It is inappropriate to consider all people with diabetes to be the same because the effects of diabetes are unique to each individual person. People with diabetes should be individually considered for employment based on the requirements of the specific job. Factors to be weighed in this decision include the individual's medical condition, treatment regimen (diet, oral medication, or insulin), and medical history, particularly in regard to the occurrence of incapacitating hypoglycemic (insulin reaction from low blood glucose) episodes. Most people with diabetes can manage their condition in such a manner that there is negligible risk of incapacitation from hypoglycemia.

Despite the significant medical and technological advances made in managing diabetes, discrimination in employment against people with diabetes still occurs. This discrimination is often based on apprehension that the person with diabetes may present a safety risk to the employer or to the public - a fear sometimes based on misinformation or lack of up-to-date knowledge about diabetes. Perhaps the greatest concern is that hypoglycemia will cause sudden, unexpected incapacitation.

Hypoglycemia occurs from a relative excess of insulin in the blood and results in excessively low blood glucose levels. The level of glucose that produces symptoms of hypoglycemia varies from person to person and for the same person under different circumstances. Hypoglycemia usually occurs gradually and is generally associated with typical warning signs, which may include rapid heartbeat, perspiration, shakiness, anxiety and hunger. When symptoms occur, preventative action can be taken by eating carbohydrates. A hypoglycemic reaction is not ordinarily associated with a loss of consciousness or a seizure. However, if warning signs are absent or ignored, and the blood glucose level continues to fall,

a more severe hypoglycemia may lead to an alteration of mental function and proceed to confusion, stupor and finally to unconsciousness. Most individuals with diabetes never suffer such severe hypoglycemia. The few who experience recurrent episodes can be identified by their medical history and placed in appropriate employment positions. Most people recognize the early warning signs of hypoglycemia and can quickly counteract them by eating. Furthermore, the proper use of systems that allow rapid and accurate self-monitoring of blood glucose levels can assist people in avoiding significant hypoglycemia. Thus, most people with diabetes can manage their condition in such a manner that there is a negligible risk of incapacitation from hypoglycemia.[3]

In spite of significant medical and technological advances and the tremendous progress made in the treatment and management of diabetes, the Fifth Circuit categorically denied an employment opportunity to Petitioner because he used some insulin to treat his diabetes. The myopia of the Fifth Circuit, its classic stereotypical

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[3] *Hypoglycemia and Employment*, Position Statement of the American Diabetes Association, *Diabetes Care*, 13:535 (1990).

view and its unfounded fear concerning diabetes is painfully clear from its decision in this case and in *Chandler* when it stated:

> "Woe unto the employer who puts such an employee behind the wheel of a vehicle owned by the employer which is involved in a vehicular accident." *Chandler v. City of Dallas*, supra, 1395; *Daugherty v. City of El Paso*, 56 F.3d 695 (5th Cir. 1995).

This is in spite of the fact that there is no empirical evidence that a driver who takes some insulin presents any significantly enhanced risk that requires any driving restrictions other than medical approval or certification.[4] This is in spite of the fact that no state (including Texas) prohibits people who take some insulin to treat their diabetes from driving an automobile, unless they do not have appropriate medical approval or certification. This is in spite of the fact that the Federal Highway Administration has instituted a waiver program allowing persons who take insulin to treat their diabetes to drive a commercial vehicle in interstate commerce.[5] And, this is in

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[4] Hansotla, P. and Broste, S.K. *The Effect of Epilepsy or Diabetes Mellitis on the risk of Automobile Accidents. New England Journal of Medicine*, 324: 22-26 (1991).

[5] 58 Fed.Reg. 40693 (1993).

spite of the fact that many courts and authorities recognize that diabetes is a "fact specific disease" which requires a "fact specific individualized inquiry."[6]

This Court should grant Certiorari to resolve this issue because it directly affects the employability of 3.8 million Americans.

III. THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THIS CASE IS A CLEAR OPPORTUNITY FOR RESOLUTION OF THE LEGAL ISSUE PRESENTED.

The record in this case clearly frames the legal issue concerning the necessity of an "individualized inquiry" for a person who takes some insulin to treat his diabetes. Thus, this case presents this Court with an ideal opportunity to resolve an important issue over which lower courts are in conflict concerning the protections of the Americans With Disabilities Act for persons who take insulin.

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[6] Bayler, *Dulling A Needle: Analyzing Federal Employment Restrictions on People With Insulin-Dependent Diabetes*, 67 Ind.L.J. 1067, 1089 (1992).

In the trial court there was no record made by the Respondent-Employer that Petitioner-Employee was not "otherwise qualified" to drive a bus or that Petitioner posed some "direct threat" or "significant risk" to the public. The Fifth Circuit decision rests solely on the fact that Petitioner took some insulin to treat his diabetes and not because Petitioner was an actual danger or a risk to anyone. There was no event or accident, rather only the rationale of *Chandler*, to support this decision. This issue in the Fifth Circuit is clear: If you take some insulin you cannot be allowed to make your living driving a vehicle regardless of how well you are or what your driving history has been.

This Court should grant Certiorari in this case because the legal issue is crystal clear.

IV. THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE FIFTH CIRCUIT COURT WAS ERRONEOUS AND A REVIEW BY THIS COURT PROVIDES THE ONLY REMAINING OPPORTUNITY TO REMEDY THE ILLEGAL DISCRIMINATION SUFFERED BY PETITIONER CONSISTENT WITH THE PRIOR DECISION OF THIS COURT AND CONGRESSIONAL INTENT.

This Court and Congress mandates that persons with disabilities be evaluated for protection under the Rehabilitation Act and the Americans With Disabilities Act through an "individualized inquiry." In *School Board of Nassau County v. Arline,* in evaluating the protection of a teacher who had tuberculosis under the Rehabilitation Act, this Court endorsed the need for an individualized inquiry rather than a categorical denial in determining whether a handicapped individual was "otherwise qualified" for a particular job:

> "[I]n most cases, the district court will need to conduct an individualized inquiry and make appropriate findings of fact. Such an inquiry is essential if §504 [Rehabilitation Act] is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees. *School Board of Nassau County v. Arline,* supra, 187.

Numerous courts have applied and followed the *Arline* standard in determining whether a person was "otherwise qualified" for a particular job and have ruled that a "blanket" restriction on employment is illegal. See: *Anderson v. Little League Baseball, Inc.,* 794 F.Supp. 342, 345 (D. AZ 1992); *Bombrys v. City of Toledo,* supra; *Sarsycki v. United Parcel Service,* supra; *Commonwealth*

Department of Transportation v. Tinsley, supra; *Jackson v. State*, supra. *Arline* will have no remaining vitality unless this Court reaffirms its prior determination that handicapped individuals need an "individualized inquiry" to determine if they are "otherwise qualified" for a particular job.

Additionally, Congress declared its clear intent that a court or an employer should engage in an "individualized assess-ment" when determining whether an individual's disability poses "a direct threat" of "significant risk to the health and welfare of others".

> "The determination that an individual poses a 'direct threat' shall be based on *an individualized assessment of the individual's present ability to safely perform the essential functions of the job.* This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm." (Emphasis added.) 29 CFR §1630.2(r).

The House Education and Labor Committee stated:

> "The determination that an individual with a disability will pose a safety threat to others must be

> made on a case-by-case basis and must not be based on generalizations, misperceptions, ignorance, irrational fears, patronizing attitudes, or pernicious mythologies." H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. 2 at 56 (1990).

The Fifth Circuit in this case did not use an individualized inquiry or assessment to evaluate whether Petitioner was "otherwise qualified" to perform the job of a city bus driver. The Fifth Circuit concluded:

> "In our Circuit [Fifth Circuit], such a condition [insulin-dependent diabetes], *as a matter of law,* makes him not 'otherwise qualified' to drive a bus under the Rehabilitation Act. ... This holding likewise compels us to hold that under the ADA [Americans With Disabilities Act] Daugherty is not a 'qualified individual with a disability' for the position of bus driver. This essential element of his claim is lacking even if the city could have accommodated him by signing a waiver [from the Federal Highway Administration]." (Emphasis added.) *Daugherty v. City of El Paso,* supra, 698.

The Fifth Circuit approach to determining the applicability of the protections of the Americans With Disabilities Act is contrary to the mandate of this Court and Congress. This Court should grant Certiorari to correct the Fifth Circuit's deviation from the prior decision of this Court and Congressional intent. Supreme Court Rule 10(c).

CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari to review and correct the Fifth Circuit Court's decision about diabetes and insulin in the workplace. This decision is "based on prejudice, stereotypes or unfounded fear"

Respectfully submitted,

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